Supreme Court, U.S.
FILED

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No.

In The Supreme Court of the United States

Paul A. Reilly,

Petitioner(s)

v.

Alvin Weiss, Philip M. Freedman, Richard C. Camp, Arlene Albino, Toby Kleinman, Ilene Miklos, Timothy Welles, Mathias Hagovsky, David Brodzinsky, James Wulach, and Theresa M. Pagano

Respondent(s)

On Petition for Writ of Certiorari
to the Third Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Former Third Circuit Chief Judge Becker's testimony before the Commission on Structural Alternatives for the Federal Courts of Appeals shows a structured bias against pro se litigants and cases whereby judicial function(s) are performed by duly appointed appellate judges in counseled cases but are "abdicated" to staff attorneys in pro se cases. His reasons are statistics show pro se cases have no merit and / or are handwritten and / or are "gibberish" and thus must be accorded less weight. The appellate panel in this matter merely, but surprisingly, denies that they distinguish pro se litigants and cases in such manner. The Circuit, denying en banc review, is silent.

Judge Becker's candor is exactly related to the issues. Counseled cases are disposed of by judges to prevent "cases from slipping through the cracks." Such slippage in the search for the truth has a direct bearing as the District Judge twice imposed restraints on plaintiff's right of access to the court without notice or hearing prior to judgment. Her Honor subsequently called for the filing of a brief on a "Motion to Vacate". The merits have never been addressed but the order entered disposed of the matter as a motion for rehearing.

(1) Whether the Third Circuit is competent to decide the issues presented because said judges have "abdicated their judicial duties" to staff attorneys'; and whether the three judge panel's denial of the facts showing staff attorneys perform judicial functions and the en banc panel's knowledge they are likely to be material witnesses concerning said matters renders the Circuit incompetent to decide the issues.

(2) Whether restraints on access to the court, first without notice and hearing, and later by silently changing the motion to vacate into a motion to rehear violates the right to adequate notice and opportunity to be heard.

(3) Whether the Circuit and District Court judgments are void.

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CITATION OF OPINIONS AND ORDERS

The opinion of the court of appeals, dated, March 10, 2004, is unreported. I V 5-11. Motion for Rehearing with Suggestion for Rehearing En Banc was denied in an order dated July 19, 2004. 3 I V 86-87. The opinions and orders of the district court filed from December 26, 2001 and July 18, 2002, (specific references are made below) are also unreported. I V 12-45.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2004. A petition for rehearing with suggestion for rehearing en banc was denied on July 19, 2004.

The District Court has jurisdiction pursuant to 28 U.S.C. § 1331 and § 1343 . It is on remand from the Third Circuit Court of Appeals. I V 16.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Plaintiff respectfully petitions for a writ of certiorari to review the judgment of the United State Court of Appeals for the Third Circuit in this case.

1. On November 13, 2001 the Clerk of the District Court of New Jersey requested the defendants' attorneys each submit a form of order on mandate, noting the order of the district court is affirmed. I V 16-27. The submissions all stated the Complaint was dismissed as to the particular defendants with prejudice. I V 28-37. The circuit order however dismissed without prejudice to the minor. I V 82. On November 26, 2001 the district court judge was informed of the discrepancy, I V 48, and Plaintiff subsequently submitted a form of order. I V 44-51. Between November 30, 2001 and March 6, 2002 the district judge entered orders on mandate dismissing the complaint with prejudice and did not mention it was dismissed without prejudice to the minor. I V 28-37. Furthermore, without notice or opportunity to be heard, the district judge issued a directive that "ordered the Clerk of the Court not to accept further motions regarding this matter; ***. I V 15. Appeal was taken January 2, 2002. I V 12.

2. In a sua sponte order entered April 25, 2002 the district judge issued far reaching restraints on Plaintiff's access to the courts and again the order was entered without notice or opportunity to be heard prior to entry. I V 39-42. This order was appealed May 1, 2002. I V 12.

3. On May 14, 2002 Plaintiff wrote the district judge noting the April 29, 2002 motion to vacate and stay the April 15, 2002 had not been docketed. I V 52-53. The Letter went on to note the circuit had had been informed. Id. The district judge responded by stating she had received the aforesaid letter and was (1) construing it as a "motion to vacate" and (2) that a brief may be filed in support of the motion. I V 50. The brief was "received" on May 16, 2002,

but never entered on the docket. I V 56. The brief argued the restraints were void (1) for lack of notice and opportunity to be heard and (2) the procedure offered the average person as judge the possible temptation not to hold the balance nice, clear and true. I V 56-70 .

4. On July 15, 2002 the district judge entered an order which treated the motion to vacate as a motion for reconsideration and consequently affirmed the April 11, 2002 order. I V 44. Appeal was taken August 14, 2002. I V 43.

5. On September 5, 2002 a motion for disqualification and to correct the record was filed in the district court, I V 70 – 78, and the district court was asked to dispose of said motion on September 27, 2002. When no answer was forthcoming the circuit court was asked to accept an appeal from the denial of all post judgment motions and / or for the exercise of its supervisory power to dispose of all pending matters. I V 46.

6. On March 10, 2002 the circuit court "ordered and adjudged" that the district court orders be modified, consistent with its opinion. I V 5-11.

7. The court held that Plaintiff's motion to disqualify the three judge panel was denied. The per curiam opinion found the bases of the motion to be "that Third Circuit judges have abdicated their responsibilities in pro se to staff attorneys [and] [h]is allegation is not true – the judges of this court personally read and consider each brief and motion filed in cases on which they preside. Thus, they find no basis under 28 U.S.C. § 455 for recusal and no basis for disqualification of staff attorneys.

8. The circuit also held the lack of notice and opportunity to be heard in the district court prior to the entry of judgment was "cured" by "Reilly's letter to, Judge Hochberg's letter to Reilly, Reilly's brief. Although the May 2, 2000 authorization of a "motion to vacate", I V 50, may fulfill the district "[c]ourt's desire to give adequate notice" I V 9, the Circuit panel offers no foundation in fact or law that "the previous lack of notice * * * was cured, i.e. becomes adequate notice, by providing the plaintiff with the requisite opportunity to be heard in opposition to and reconsideration of the April 11, 2002" Id.

9. It was further held that the "threat to sue the judicial officers who rendered decisions against him in federal court * * * do not * * * standing alone * * * warrant [] the entry of an order barring further filings. IV 9.

10. The circuit panel did however state that given the context of the order, the protracted nature of the proceedings, and the numerous meritless (as opposed to frivolous) filings, the court was justified in entering some sort of restraints I V 9.

11. The panel concluded the district judge's order was overbroad and restrained "[a]ny claim against any defendant which can be traced back to this litigation is controlled by this order." I V 10

12. Accordingly, plaintiff is restrained from filing any new case, proceeding, motion other litigation document in state or federal courts dealing with the issues resolved in Reilly v. Weiss, D.N.J. Civ. No. 97-cv-09883, without specific written permission of the district Court." I V 10

REASONS FOR GRANTING THE PETITION

The question submitted to this court concerns the competency of lower tribunals who have presided in this matter and whether they have acted beyond the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. This is, for the following reasons, a substantial question requiring this Court's attention.

1. This Court has long said:

> "[I]f the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception * * * the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court * * * However done, it should be upon due notice to the parties to be affected by the dismissal." Morris v. Gilmer, 125 U.S. 315, 325-326 (1889).

> "If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute." State of Minnesota v. Northern Securities Co., 194 U.S. 48, 62 (1904).

Accordingly, this court must and has addressed the controversies of whether a tribunal is properly constituted. When an appellate court is not properly constituted it is no court at all. Nguyen v. United

States, 539 U.S. 69 (2003) (Court of appeals consisting of two Article III judges and one Article IV judge does not have the authority to decide petitioner's appeal). So too, "where the question is not merely an error committed by the circuit court of appeals in failing to decide the merits, but an error resulting from the fact that the circuit court of appeals which passed upon the case was virtually no court at all, because not organized in conformity to law." Wm. Cramp Sons v. Curtis Turbine Co., 228 U.S. 645, 651-652 (1913) (An appellate court is improperly constituted for the reason that a district court judge who enters a pro forma decree below is disqualified from participating in the appellate review of that decree.).

Disqualify means to debar legally (citation omitted). * * * That is synonymous with lack of legal capacity, i.e. with inability to serve." Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 904 (4th Cir. 1983), cert. den. 464 U.S. 1040 (1984) citing 28 U.S.C. § 46(b) and 28 U.S.C. § 47. A court that is incompetent by reason of bias to adjudicate the issues pending before it is not only an extraordinary circumstance in the sense of presenting a highly unusual factual situation, but an extraordinary circumstance causing great, immediate and irreparable harm. Kugler v. Helfant, 421 U.S. 117, 124-125 & n.4 (1975) (citations omitted). Thus when a justice, judge or magistrate is disqualified pursuant to 28 U.S.C. § 455 the court is not properly constituted because "virtually every court of appeals has recognized" that disqualified "judge's do not adjudicate cases that they have no statutory power to hear." Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3rd Cir. 1993) quoting In Re School Asbestos Litigation, 977 F.2d 764, 778 (listing cases) (3rd Cir. 1992).

This Court has long been sensitive to the inherent dangers arising from "delegating to staff assistants more and more work that we once expected judges to perform." Jackson v. Virginia, 443 U.S. 307, 337 & n. 10 (1979) (Stevens, J., dissenting). Indeed, certain structures are candidly frowned upon:

> "It is one thing to do the work yourself, and it is another thing to simply approve the recommendation of

> another person who has done the work. * * * I would feel entirely different about a system that assigned the preparation of "bench memos" - memoranda that summarize the contention of the parties and recommend a particular result in an argued case - to one law clerk in a large pool of clerks." Rehnquist, William H., The Supreme Court (Revised and Updated) First Vantage Books Edition, NYC, 2002, p. 235.

Such a structure is in place in the Third Circuit Court of Appeals and that structure renders said tribunal incompetent to adjudge the issues before it. The facts showing that the Third Circuit Court of Appeals is not competent are (1) Judge Becker's testimony to the Commission on Structural Alternatives for the Federal Courts of Appeals and (2) certain Circuit Judges' admission that they have been or the Circuit Justices are likely to be material witnesses in the proceeding.

First, when Judge Becker gave testimony, as Chief Judge of the Circuit, to the Commission on Structural Alternatives for the Federal Court of Appeals, his voluntary and self-acknowledged purpose was to provide a description of how the Third Circuit does its work. "I would like to begin with a brief description of how appellate judges do their work." 145 T 12-19. (Public Hearing, Thursday, April 16, 1998, New York, New York, Commission on Structural Alternatives for the Federal Courts Of Appeals (Gross, Neil R., Court Reporters and Transcribers, 1323 Road Island Ave., N. W., Washington, D.C. 20005-3701) ("page no. Transcript, transcript line no.")).

He went on to testify that counseled cases are treated in accord with the demands of an Article III Tribunal. In counseled cases judges "get the briefs and the motion papers or what have you and you read them." 146 T 16-18. "[I]f you have someone else read the briefs and tell you what is in them * * * that would be, in my view, an abdication of our duties." 146-147 T 21-2. "The most critically important duty of federal appellate judges, that is, to listen and read the briefs and read the papers" cannot be delegated. 148 T 11-20.

Moreover, according to Judge Becker, relying heavily on law clerk drafts of opinions in counseled cases cannot be done because while" appellate commissioners and appellate magistrates and staff attorneys are capable people * * * [t]hey are not Article III judges. And if you miss, things will between the cracks. If you miss 2 or 3 or 4 percent cases, that is in my view a very serious matter." 150 T 11-17. Towards this end "it is the duty of every circuit judge to contribute to keeping up the consistency and coherency of the Circuit law." 146 T 12 - 15. For these reasons and facts "[w]e don't do that in the Third Circuit. We do not use staff - - staff attorneys never look at a counseling case in the 3rd Circuit. They do pro se cases * * *. "147 T 9-12. In contrast to that of counseled cases, staff attorneys" do pro se cases" because "you have to discount them and give them a much lower weight" 167 T 2-5. Pro se cases are disregarded because the judges "really need an interpreter * * * they are written in long hand and sometimes it is gibberish * * * "the vast majority of them, the statistics show, really have no merit at all." 147 T 15-20.

"[S]taff attorneys perform a very important role in presenting them to us in an efficient way so that we can read them." 147 T 20-22. The way that staff attorneys present the pro se case is by the" [p] reparation of memoranda of law and fact and a recommendation as to disposition * * *." 3d Cir. lOP 13.2(b). However, it is the "duty of every judge to contribute to keeping up the consistency and coherency of the Circuit law * * *." 146 T 12-15. And, by being a master of the circuit law "I don't mean having a staff attorney or law clerk look it up when the occasion occurs. 157 - 158 T 20-1. In so far as responsibility for the maintenance of the consistency and coherency of Circuit law, I don't see how you can delegate that. * * * There is no substitute for a judge having in his or her head knowledge of the law of his or her circuit * * *." 148-149 T 21-11. Thus, while "the most critically important duty of appellate judges, that is, to listen and read the briefs and read the papers" cannot be delegated in counseled cases, 148 T 17-19, pro se litigants find that "critically important function" is abandoned to the staff attorneys.

So too, the judges cannot "rely more heavily on law clerk drafts of opinions * * * because the critically important thing in terms of

this delegation is while appellate commissioners and appellate magistrates and staff attorneys are capable people * * * [t]hey are not Article III judges." 150 T 10-15. Yet the judges also delegate this "critically important" function to staff attorneys, who are mysteriously somehow better qualified as "interpreter[s]" of pro se submissions and "gibberish", and those interpretations are presented to the judges in memorandums of law and fact and recommendations for disposition so that the judges' may understand them. But just as Article III is of no moment in pro se cases, the search for the truth is also of no moment because the Article III judges' performance of these duties is, at best, necessary to prevent counseled "cases from slipping through the cracks." 150 T 14-17. This is not necessary in pro se cases because in disposing of pro se cases, as opposed to counseled cases, "you have to discount them and give them a much lower weight," 167 T 2-5, they "really need an interpreter * * * they are written in long hand and sometimes it is gibberish * * *" and " the vast majority of them, the statistics show, really have no merit at all." 147 T 15-17.

Second, the March 10, 2004 per curiam opinion of judges Roth, Ambro and Smith shows that the Circuit Judges have been or are material witnesses in the proceeding. It reads in relevant part:

> "To the extent it is construed as a motion to disqualify all circuit judges and disqualify staff attorneys, is denied. Reilly bases his motion on an allegation that Third Circuit judges have abdicated their responsibilities in pro se cases to staff attorneys. His allegation is not true — the judges of this court personally read and consider each brief and motion filed in cases on which they preside." I V 11, n.4.

It is axiomatic that "[a] judge cannot be a witness in his own cause ('Judex non potest esse testis in propri caus')". Bouvier's Law Dictionary, 1856 citing 4 Co. Inst. 279. From 1821 to

1974, the content of 28 U.S.C. § 455 and its predecessor provide:

> "Any justice of Judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or any other proceeding therein." Lilieberg v. Health Services Acquisition Corp., 486 US 847, 858 n.7 (1988); Liteky v. United States, 114 S. Ct. 1147, 1153 (1994).

The Congress expressly requires that justice, judge or magistrate be disqualified in certain circumstances. 28 U.S.C. § 455. Particularly,

> "[a]ny justice, judge or magistrate shall disqualify himself in any proceeding * * * [w]here he has served in government employment and in such capacity participated as * * * [a] material witness concerning the proceeding * * *; 28 U.S.C. § 455 (b) (3), or "[i]s to the judge's knowledge likely to be a material witness in the proceeding. 28 U.S.C. § 455 (b) (5) (iv).

The Federal Rules of Evidence supports this conclusion. Rule 605 reads:

> "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made to preserve the point." Fed. R. Evid. 605.

Furthermore, disqualification pursuant to statute is mandatory and may not be waived. So too, no justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated under subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification. 28 U.S.C. § 455(e).

The policy reason for this prohibition is not hard to understand.

> "To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. Berger v. United States, 255 U.S. 22, 36 (1921)."

> The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector." Fed. R. Evid. 605, Notes of Advisory Committee on Rules.

> "The comprehensive and inflexible character of the probation was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision of a case in the

> circuit court of appeals, when without such consent, because of the prohibition of the statute, he would be disqualified from so doing, - a purpose whose public policy is not difficult to understand. Wm. Cramp Sons v. Curtis Turbine Co., Supra, 228 U.S. at 650.

"While the district judge may personally know this allegation is false, such knowledge is not a proper basis for judicial notice." United States v. Lewis, 833 F.2d 1380, 1385-86 (9th Cir. 1987); United States v. Sorrells. 714 F.2d 1522. 1527 n.6 (11th Cir. 1983); Virgin Islands v. Gereau. 523 F.2d 140, 147-48 (3d Cir. 1975).

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). The confidential, internal workings of the federal judiciary do not seem to fall into either category: they are inherently outside the realm of general knowledge and there are no ready sources for incontestable confirmation of the facts in question here. Contestability and disputation are critical considerations here. We do not mean to suggest that a court could never take judicial notice of its own internal procedures. The problem is that the procedures in question here entail the central allegation of impropriety in the case, and the judicial officers accused of that impropriety would be both the conduit and source of the confidential information vindicating those procedures." Switzer v. Coan, 261 F.3d 985, 989 (10th Cir. 2001).

"In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he ... is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; California Evidence Code § 703; Kansas Code of Civil Procedure § 60-442; New Jersey Evidence Rule 42. Cf. 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311." Fed. R. Evid. 605, Notes of Advisory Committee on Rules.

Furthermore, at this stage of the proceedings, plaintiff's allegations must be accepted as true and construed in the light most favorable to plaintiff. Switzer, supra, 261 F.3d at (citations omitted). Conversely, assuming for the sake of argument that the judges' testimony were appropriate, the judges must do more than just rest upon mere allegations, general denials, or vague statements. Sladana v. Kmart Corp., 260 F.3d 228, 232 (3rd Cir. 2001)(citations omitted). But they do not. Opinion, p.6, n. 6 (His allegation is not true — the judges of this court personally read and consider each brief and motion filed in cases on which they preside.").

2. Just as the court must provide due notice to the parties to be affected when a court cannot properly take cognizance of a controversy, Morris, supra, 125 U.S. at 325-326, so too a tribunal cannot take action without meeting the requirements of notice and opportunity to be heard.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be first notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1994) (citations omitted).

This Court has also held that:

> "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." Mullane v. Central Hanover Trust Co., 339 U.S. 206, 314 (1950). "[T]he root requirement of the Due Process Clause is

'that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest. '" Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985).

Fed. R. Civ. P. 65 (a & b) provide specific pre-deprivation procedures to be followed when issuing temporary, preliminary or permanent restraints. Since there was no pre--deprivation hearing due process is violated because "where a pre-deprivation hearing is available prior to final deprivation it must be provided regardless of the post-deprivation remedy." Zinermon v. Burch, 494 U.S. 113, 132 (1990). Furthermore, constitutionally inadequate notice renders the judgment void. U.S. v. One Toshiba Color Television, 213 F.3d 147, 156-157 (3rdCir. 2000).

The hearing must not only be at a meaningful time and in a meaningful manner, Goldberg v. Kelly, 397 U.S. 254, 268 (1970) (citations omitted), but must be tailored to the capacities and circumstances of those who are to be heard. Id. At 268-269. Adequate notice requires disclosure of all issues to be discussed and sufficient time to prepare. Yohn v. Love, 76 F.3d 508, 516 (3rd Cir.1996). The use of such measures against a pro se plaintiff should be approached with particular caution * * *. In Re Oliver, 682 F.2d 443, 445 & n.5 (3rd Cir. 1982). The district court must assume the burden to notify the party to be enjoined and to invite response. In Re Hartford Textile Co., 613 F.2d 388, 390 (2nd Cir. 1979), cert. den. 447 U.S. 907. Indeed, the district court must provide prior notice and an opportunity to oppose an order that enjoins the clerk of that court from accepting papers for filing before the order is instituted. In Re Oliver, 682 at 446; Gagliardi v. McWilliams, 834 F.2d 81, 83 (3rd Cir. 1987). Absent a full, fair, potentially effective opportunity to defend the right to a hearing is a barren one. Morgan v. United States, 304 U.S. 1, 18 (1938).

It is well settled a decree is to be construed with reference to the issues it was meant to decide. Mayor & Alderman of the City of Vicksburg v. Henson, 231 U.S. 259, 269 (1913). A motion to vacate is not a motion to reconsider because they serve different

purposes and produce different consequences. Herzog Contracting Corp. v. McGowen Corp., 976 F.2d 1062, 1065 (7th Cir. 1992). Rule 59(e) serves the purpose of reconsidering matters properly encompassed in a decision on the merits. Osterneck v. Ernest & Whinney, 49 U.S. 169, 174-177 (1989); White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451-452 (1982). It questions the correctness of the judgment. New Castle County, 933 F.2d 1162, 1176 (3rd Cir. 1991).

A motion to vacate may be filed pursuant to Rule 59(e) and Rule 60(b). Forman v. Davis, 371 U.S. 178 (1962). But "vacate" has a particular meaning. Its usage means "to annul, to render an act void." Bouvier's Law Dictionary, 1856 Ed. To vacate a judgment "clears the path for future relitigation of the issues between the parties and eliminates a judgment." United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950). It means to "wipe[] the slate clean, not only rendering the decree sterile but also eviscerating any collateral effects and indeed casting a shadow on the past action taken under the decrees imprimatur * * *." Inmates of Suffolk County Jail, 129 F.3d at 622; Cody v. Hillard, 304 F.3d 767, 774 (8th Cir. 2002).

3. The aforesaid order~~s are~~ void. First, a Court order that is inconsistent with due process is void and relief is mandatory.

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Old Wayne Mut. Life Ass'n. v. McDonough, 204 U.S. 8, 17 (1907) citing Galpin v. Page, 18 Wall. 365, 366 368.

"The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court, in rendering them, would transcend the limits of its authority in those cases." Windsor v. McVeigh, 93 U.S. 274, 282 (1876); See also, Reynolds v. Stockton, 140 U.S... 254,268 (1891); Barnes v. Chicago, M. & St. P. R. Co. 122 U.S. 1, 14 (1887); United Switch & Signal Div., American Standard Inc. v. United Radio and Mac. Workers of America, Local 610, 900 F.2d 608, 612 (3rd Cir 1990); Eberhardt v. Integrated Design & Construction, Inc., 167 F.3d 861, 871 (4th Cir. 1999) quoting U.S. v. Schwartz, 976 F.2d 213, 217 (4th Cir. 1992); Antoine v. Atlas Turner, Inc., 66 F.3d 105, 106 (6th Cir. 1995 quoting In Re Edwards, 962 F.2d 641, 644 (7th Cir. 1992); Carter v. Fenner, 136 F.3d 1000, 1005 (5th Cir. 1998); In Re Center Wholesale Inc., 759 F.2d 1440, 1448 (9th Cir. 1985).

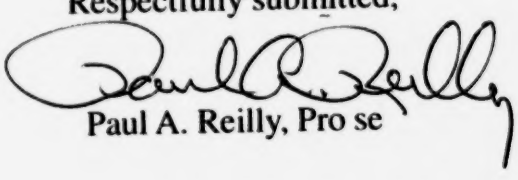
Second, a judgment based on a prior void judgment is also void. Orner v. Shalala, 30 F.3d 1307, 1310 (10th Cir. 1994) citing V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 224 (10th Cir. 1979); Antoine, Supra, 66 F.3d at 108 citing U.S. v. Indoor Cultivation Equip. From High Tec Indoor Garden Supply, 55 F.3d 1311, 1317 (7th Cir. 1995); Carter, 136 F.3d at 1005; Evans v. City of Chicago, 10 F.3d 474 (7th Cir. 1993); Michigan Sur. Co. v. Service Mach. Corp., 277 F.2d 531 (5th Cir. 1960).

CONCLUSION

For all of the foregoing reasons the petition of certiorari should be granted.

May 26, 2005

Respectfully submitted,



Paul A. Reilly, Pro se